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No. 84-1288

In The

Supreme Court of the United States

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M., and DUSTY R., Minors, By and Through Their Next Friend, CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent and MARK CLARY, Intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding it unethical for parties in civil rights class actions to negotiate a settlement on the merits simultaneously with a settlement of attorney's fees and costs.

2. Whether the Court of Appeals erred in enforcing the merits portion of the negotiated settlement while reversing the district court's approval of the attorney's fee waiver.

LIST OF PARTIES

Petitioner John V. Evans was sued in his official capacity as Governor and chief executive officer of the State of Idaho. Petitioner Rose Bowman is the successor in office to Milton G. Klein, sued in his official capacity as Director of the Idaho Department of Health and Welfare. Petitioner George Bachik was sued in his official capacity as Administrative Director of State Hospital South, an administrative unit of the Department of Health and Welfare. Petitioner William Gruzinski is the successor in office to Carroll Elmore, sued in his official capacity as Clinical Director of State Hospital South. Although included in the caption before the Court of Appeals, Defendant Jerry Evans, State Superintendent of Public Instruction, was not a party to the orders appealed and is not a petitioner herein.

Respondents, Jeff D., Paul E., John M. and Dusty R., sued individually and on behalf of children who, because of mental illness, have been admitted to treatment facilities of the State of Idaho. As minors, suit is brought on their behalf by their next friend, Charles Johnson, III, who was also their counsel of record before the District Court and Court of Appeals.

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REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Appeals vacating the District Court's denial of attorney's fees and costs is reported at 743 F.2d 648 (9th Cir. 1984).

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JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651 (1982).

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CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

U. S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1988 (1982)

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Rule 23(e), Federal Rules of Civil Procedure

> Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 2-109, Local Rules of Practice of the United States District Court for the District of Idaho

> The members of the bar of this Court shall adhere to the American Bar Association's Code of Professional Responsibility and the Code of Professional Ethics promulgated by the Supreme Court of the State of Idaho.

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STATEMENT OF THE CASE

Respondents, representing minor residents of various state-operated or -supported institutions in Idaho, brought this civil rights class action on August 4, 1980, in Federal District Court for the District of Idaho, seeking declaratory and injunctive relief on behalf of emotionally or mentally handicapped Idaho children committed to such institutions. (J.A. 4-5). The complaint specified nine causes of action, including denial of due process and equal

protection under the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 1, 13, and 18 of the Idaho Constitution; discrimination against handicapped persons in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1461, and the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081; and failure to comply with various provisions of the Idaho Constitution and Idaho Code dealing with the treatment, custody, and education of institutionalized juveniles. (J.A. 17-30). Specifically, respondents sought an injunction prohibiting the admission of members of the plaintiff class to State Hospital South, a psychiatric hospital in Blackfoot, Idaho, administered by petitioners Bowman, Bachik and Gruzinski in performance of their duties as officers in the Idaho Department of Health and Welfare; establishment of community-based residential facilities to provide additional mental health services; and costs and attorney's fees pursuant to 42 U.S.C. § 1988. (J.A. 30-31). John V. Evans was named as a defendant in his official capacity as Governor of the State of Idaho.

Settlement negotiations began on January 8, 1981, when Charles Johnson, III, attorney and next friend for plaintiffs/respondents (J.A. 32), sent a proposed consent decree to James Wickham, Deputy Attorney General for the State of Idaho. This proposal was silent as to attorney's fees and costs. In a return proposal, dated March 1981, defendants/petitioners offered to grant part of the relief requested but specified in paragraph 13 that "[e]ach party shall bear all costs and attorneys fees incurred in this action." (A. 1).

Respondent Johnson and his co-counsel, Russell E. Webb, replied to this counter-proposal on March 26, 1981, in a letter that indicated basic approval of the education portion of petitioners' March 1981 proposal, but made a number of specific objections to the mental health portion. The letter kept open the attorney's fees negotiations by stating that "[i]n light of these problems, there can be no stipulation on your paragraph 13 [waiver of attorney's fees] *at this time.*" (A. 5) (emphasis added).

Mr. Wickham demonstrated flexibility on the attorney's fees issue in his April 3, 1981, reply: "[i]f you desire to preserve your right to seek fees and costs in the unlikely event enforcement proceedings are required, the state is willing to modify its position to the effect that all parties bear their own costs and fees *thus far incurred.*" (A. 8-9) (emphasis added).

Intense negotiations over the next two months included active bargaining over both the merits and the attorney's fees and resulted in concessions on both sides. (*See* letters of May 15, 1981, and June 16, 1981, A. 9, 12). Respondents' proposal of July 14, 1981, contained a revised paragraph 13(e) providing that all parties "shall bear their own attorney's fees and costs thus far incurred." (A. 15). The stipulation in settlement of the education related claims, accepted by the district court in an order dated October 19, 1981, incorporated respondents' own wording explicitly waiving attorney's fees in paragraph 12(e). (J.A. 54).

Respondents' proposal to settle the remaining mental health claims, tendered on November 10, 1981, again put forward identical fee waiver language in paragraph 10(e).

(A. 18). However, negotiations reached an impasse in December 1981. Both sides then moved for summary judgment. (R. Dist. Ct. Doc. Nos. 57 and 62). On July 26, 1982, the district court granted partial summary judgment in favor of petitioners as to all claims except those arising under the federal constitution and a single state law provision. (J.A. 56-57).

Following the district court's summary judgment order, settlement proposals by petitioners continued to include attorney's fee waiver provisions, whereas proposals by respondents were silent as to attorney's fees. In March 1983, counsel for respondents asserted that it was unethical for petitioners to condition settlement on waiver of costs and attorney's fees. However, the parties agreed to submit the ethics question to the district court, negotiated a settlement with a provision that both respondents and petitioners waived "costs and attorney's fees thus far incurred, *if so approved by the Court*" (J.A. 104) (emphasis added), and further stipulated that the settlement was to be tendered to the district court for approval only if it concluded the practice was ethical.

On March 22, 1983, pursuant to Fed. R. of Civ. P. 23(e), the district court took the proposed stipulation under advisement and vacated trial.[1] (R. Dist. Ct. Doc. No. 116). However, even before the district court ruled on the ethics question and the settlement agreement containing the stipulated fee waiver provision, respondents filed a

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[1]Due to the death of the court reporter present at the March 22, 1983, hearing and the extremely poor quality of the tape recording of that hearing, no transcript of the hearing is available.

motion seeking costs and attorney's fees on April 4, 1983. (J.A. 87). The district court on April 28, 1983, upheld the ethics of the waiver and thus approved the entire stipulation settling the mental health claims. (J.A. 93-94). The court then denied respondents' separate motion for costs and attorney's fees in an order dated May 9, 1983. (J.A. 106-107). Respondents' appeal to the Ninth Circuit Court of Appeals on May 25, 1983, challenged only this order denying attorney's fees and costs. (J.A. 108).

Recognizing that petitioners had agreed to settle the merits of the case only on condition that attorney's fees be waived—and that petitioners retained the option "to withdraw the stipulation and put us to trial" if the fee waiver was not approved (J.A. 93)—the district court granted petitioners' June 3, 1983, motion (J. A. 109) to suspend performance of the entire stipulation pending appeal in an order dated August 12, 1983. (J.A. 111). This recognition of the nonseverability of the merits and attorney's fees was also the basis of the district court's denial on September 6, 1983 (J. A. 114) of respondents' August 29, 1983, motion (J. A. 113) to stay the August 12 order. *See* letter from district court Judge Marion J. Callister to attorney Johnson. (J.A. 115).

Despite the district court's clear understanding of the intent of the parties, the Ninth Circuit has consistently taken the view that the merits and attorney's fees portions of the stipulation are severable. On September 26, 1983, the Ninth Circuit vacated the district court's stay order of August 12, 1983 (J. A. 117), thus requiring petitioners to comply with the mental health stipulation even though the attorney's fees issue was on appeal. Similarly, the Ninth Circuit's decision, which "reversed and re-

manded for determination of reasonable attorneys fees," while upholding the remainder of the stipulation, *Jeff D. v. Evans,* 743 F.2d 648, 652 (9th Cir. 1984), reflected this view.

Subsequent rulings by the Ninth Circuit have forced petitioners to comply with the merits portion of their stipulation upon the settlement while depriving them of the benefit of their bargain on attorney's fees. The Ninth Circuit on November 6, 1984 (J. A. 119), vacated the district court's October 22, 1984, order (J. A. 118) which had granted petitioners' motion (R. Dist. Ct. Doc. No. 138) to toll their obligation to reply to respondents' attempts to discover the degree of petitioners' compliance with the mental health portion of the stipulation. On December 6, 1984, the Ninth Circuit denied *in toto* petitioners' November 28, 1984, motion for stay of mandate. (R. 9th Cir.). A subsequent motion by petitioners to recall the mandate was granted on January 14, 1985, but with the proviso that petitioners were required to comply with the mental health stipulation. (R. 9th Cir.).

SUMMARY OF ARGUMENT

The simultaneous negotiation of both merits and attorney's fees in class action settlements is not inherently unethical. The plain language of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) [hereinafter cited as Act], contains no proscription against simultaneous negotiations. The weight of judicial interpretation of the Act permit simultaneously negotiated

settlements, as do most bar opinions that have addressed the issue, though not binding on the courts.

Nor does the Act proscribe a defendant's offer of settlement, conditioned on reduction or waiver of plaintiff's attorney's fees. Plaintiff has a right to waive attorney's fees and defendant has a right to condition offers of settlement on such waivers during the negotiating process. Whether the attorney's fee issue is first raised by counsel for plaintiff or for defendant is immaterial.

A *per se* rule requiring a bifurcation of settlement negotiations as to the merits and attorney's fees will result in several unintended consequences. Most significantly, mandatory bifurcation discourages negotiated settlements, in conflict with congressional and judicial policies favoring such settlements. In addition, a mandatory process of bifurcated negotiations would be difficult, if not impossible, to enforce because it runs counter to the fundamental need of both plaintiff and defendant to settle all issues before them rather than risk the uncertainty of trial. Under a bifurcated scheme, any subsequent reduction in plaintiff's attorney's fees accrues to the benefit of the defendant, not to the plaintiff class. Bifurcation also strains judicial resources by requiring additional proceedings. Finally, the imposition of a bifurcated settlement process reflects a profund distrust of attorneys and their ability to conduct themselves ethically and in the ability of district courts to ferret out any unethical conduct that might taint a negotiated settlement.

Whatever unethical conduct that might arise in class action settlements may be exposed and expunged by the district court exercise of its Fed. R. of Civ. P. 23(e) set-

tlement review powers. Rule 23(e), while primarily intended to protect unnamed class members, may be extended to review the propriety of the attorney's fee portion of the settlement agreement on a case by case basis. In conducting this review, the district court should begin with the assumption that the parties have conducted themselves ethically during negotiations.

A defendant who agrees to settle a case only upon resolution of the attorney's fee issue should not be stuck with the merits portion of the settlement if the fees portion is rejected either by the district court or on appeal. If the district court has approved the settlement package, its approval should not be overturned on appeal absent a finding of an abuse of discretion. Any ruling that unilaterally extends defendant's liability beyond the negotiated settlement package must be rejected as violative of the settlement process. Plaintiff's attorney must not be allowed to negotiate a settlement that includes a waiver of attorney's fees as a bargaining chip to achieve more generous relief for their clients, and then seek to recoup their attorney's fees upon review.

In the present case, the plaintiffs saw their federal class action dissolve as the district court rejected the bulk of their claims by partial summary judgment. Left only with highly speculative federal constitutional claims, plaintiffs negotiated a settlement that was asknowledged by the Ninth Circuit itself as securing more for the class than the district court would have been willing to grant at trial. Under these circumstances, the district court, with a three-year exposure to the litigation, approved the negotiated settlement, including a fee waiver.

In so doing, the district court directly addressed the fee waiver issue and found no unethical conduct. The Ninth Circuit rejected the district court's approval of the settlement agreement without finding any abuse of discretion by the district court and then remanded the attorney's fee issue while upholding the merits portion of the settlement package. These rulings, together with the Ninth Circuit's imposition of a *per se* bifurcated settlement rule on all subsequent negotiated settlements in the circuit, must be reversed.

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ARGUMENT

I.

The Court Of Appeals Erred In Holding It Unethical For Parties In Civil Rights Class Actions To Negotiate A Settlement On The Merits Simultaneously With A Settlement Of Attorney's Fees And Costs.

A. Simultaneous Negotiation Of The Merits And Of Attorney's Fees Is Not Inherently Unethical.

Jeff D. ruled that due to the potential conflict of interest between the plaintiff class and its attorney in a civil rights class action, all negotiated settlements, absent unusual circumstances, must be conducted in two separate stages. 743 at 652. The Court in *Jeff D.* followed the rule established by the Third Circuit in *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015 (1977), holding that parties are forbidden to negotiate attorney's fees until after court approval of a settlement on the merits.

The bifurcated settlement process mandated by the *Jeff D.* and *Prandini* courts is directed at eliminating two distinct potential conflict of interest problems. The first problem, which was the primary concern of the *Prandini* court, is that of a "sweetheart deal." This arises when plaintiff's attorney is "tempted with a generous fee offer as a *quid pro quo* for a less than optimal settlement" for the plaintiff class. *Jeff D.*, 743 F.2d at 652; *Prandini*, 557 F.2d at 1021.

The second potential conflict of interest problem was addressed by the Ninth Circuit in *Jeff D.* Termed the "sacrifice" problem, *Moore v. Nat'l Ass'n of Sec. Dealers*, No. 83-2213, slip op. at 5-6 n. 4 (D.C. Cir. June 4, 1985) (Wald, J., concurring), the conflict of interest arises when defendant conditions a settlement offer, favorable to the plaintiff class, on a waiver or reduction of plaintiff's counsel's fees.[2] The plaintiff's lawyer may feel ethically bound to accept such an offer, despite the waiver or reduction in fees. Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U.Pa.L.Rev. 793, 794 (1983) [hereinafter cited as Comment, *Settlement Offers*].

The question before this court is whether—in light of these alleged conflict of interest problems—a ban on simultaneous negotiations is required by or will best carry out the policies embodied in the Act and the civil liberties the Act is designed to protect.

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[2]The two situations have been more bluntly called "a *bribe* or an *extortion* threat." Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 Law and Contempt. Probs. 293, 294 (1983).

1. *The Attorney's Fees Awards Act Does Not Preclude Simultaneous Negotiations.*

The Ninth Circuit in *Jeff D.* banned the simultaneous negotiation of merits and attorney's fees in civil rights class action suits. Under this ban, the plaintiff is prevented from waiving attorney's fees as a bargaining chip during negotiations, and the defendant is prevented from making a full settlement offer disposing of both the merits and the attorney's fees. Neither result is addressed, let alone proscribed, by the Act, which states:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1982).

Thus, the plain language of the statute contains no ban on the common practice of simultaneous negotiations of the merits and attorney's fees, or the voluntary waiver of attorney's fees by plaintiff attorneys, or the offer by defendant attorneys of settlements that dispose of all issues in dispute, including those dealing with attorney's fees.

> Nowhere in the express language of the statute [42 U.S.C. § 2000e-5(k)] is there provision addressing the waiver of fees during settlement negotiations. Nor is there any such discussion in the language of the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. 1988, which contains an attorneys' fees provision analogous to that contained in section 706(k) .... The legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, *supra*, which contains an extensive overview of congressional policy on attorneys'

> fees awards in civil rights cases, including Title VII claims, similarly fails to refer to any limitation on the negotiability of fees.

Moore, slip op. at 14-15. Indeed, the statutory interpretation and legislative history—as authoritatively construed by this Court and the federal courts of appeal—supports the simultaneous negotiation and voluntary waiver of attorney's fees.

A primary purpose of the Act was to "achieve uniformity in the remedies provided by federal laws guaranteeing civil and constitutional rights." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, [hereinafter cited as House Report]. To achieve this goal, an earlier version of the Act providing for mandatory awards of attorney's fees was rejected and substitute language ("the court, in its discretion") was adopted. *Id.* at 3. The Act was expressly patterned after Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k) (1976). House Report, *supra* at 5. Further, Congress expressly intended to authorize courts to look to developing case law on other fee provisions to implement the Act. *Id.* at 8.

Significantly, before passage of the Act, federal courts had interpreted Titles II and VII to allow plaintiffs to waive attorney's fees. *Clanton v. Allied Chemical Corp.,* 409 F.Supp. 282 (E.D. Va. 1976); *Leisner v. N.Y. Telephone Co.,* 398 F.Supp. 1140 (S.D.N.Y. 1974). Congress must be presumed to have known of this judicial gloss on the parallel statutes upon which it patterned the Act.

Since 1976, federal courts have repeatedly authorized waivers and implied waivers from the various statutes the

Act was intended to "make uniform." *Moore*, No. 83-2213, slip op. (D.C.Cir. June 4, 1985); *Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985); *Nat'l Treasury Employees Union v. IRS*, 735 F.2d 1277 (11th Cir. 1984); *Young v. Powell*, 729 F.2d 563 (8th Cir. 1984); *Jennings v. Metro. Gov't of Nashville*, 715 F.2d 1111 (6th Cir. 1983); *White v. N. H. Dept of Employment Sec.*, 629 F.2d 697 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980); and *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

In short, Congress intended by passage of the Act to achieve uniformity of remedies in federal civil rights practice and expressly recognized the discretion of federal courts to award or deny attorney's fees. Those same courts have repeatedly construed both the Act and parallel statutes to allow negotiation, settlement and waiver of attorney's fees.[3]

In like manner, this Court has recently emphasized the theme of achieving uniformity regarding remedies in federal civil suits, and extended that theme to the area of settlements as well. "There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." *Marek v. Chesny*, 53 U.S.L.W. 4903, 4906 (U.S. June 27,

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[3]To suggest that a plaintiff cannot waive attorney's fees would be an anomaly in American law: "If constitutional rights can consciously be waived by a defendant in a criminal case, it would be an excess in paternalism to conclude that parties to a civil dispute cannot do likewise." *Lazar*, 757 F.2d at 439 (Torruella, J., concurring).

1985). Applying this principle in the Fed. R. of Civ. P. 68 context, this Court construed the language and legislative history of the Act to allow defense attorneys "to make lump sum offers that would, if accepted, represent their total liability. . . ." *Marek*, 53 U.S.L.W. at 4905.

Thus, in the context of formal offers of judgment under Rule 68, defendant attorneys are free to make offers that fully dispose of both the merits of the case and the attorney's fees. If follows *a fortiori* that such offers are not unethical during the give and take of informal settlement negotiations.

2. *Bar Opinions and Ethics Committee Reports Differ Over the Ethics of Simultaneous Negotiations.*[4]

The Ninth Circuit in *Jeff D.* relied upon the New York City Bar Ass'n Comm. on Professional and Judicial Ethics Formal Op. 80-94, *reprinted in* 36 The Record of the Ass'n of the Bar of the City of New York 507 (1981) [hereinafter cited as New York Opinion I], which held it "unethical for

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[4]"Until the Model Code is adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction, the canons and disciplinary rules of the Model Code are merely horatory, not proscriptive." *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied sub nom. Construction and General Laborers Union Local 304 v. Iacono Structural Engineer, Inc.*, 104 S.Ct. 162 (1983). The United States District Court for the District of Idaho has mandated that members of the court's bar "shall adhere to the American Bar Association's Code of Professional Responsibility and the Code of Professional Ethics promulgated by the Supreme Court of the State of Idaho." Local Rule of Practice 2-109. *The Rules for Review of Professional Conduct*, adopted by the Idaho Supreme Court on June 3, 1983, do not proscribe simultaneous negotiations.

defense counsel to attempt to negotiate the fee award [under statutes designed to encourage the enforcement of civil rights and civil liberties] simultaneously with the negotiation of the settlement of the merits." *Id.* at 511. The Committee found that settlement offers conditioned on a waiver of attorney's fees are unethical, in violation of the Model Code of Professional Responsibility [hereinafter cited as Model Code], DR 1-102(A)(5) (1981), which provides, "A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."

By relying upon the extremely general prescriptions of Model Code DR 1-102(A)(5), the New York City Bar's Ethics Committee exposed the foundational weakness of its opinion.[5] The Committee was unable to find any specific A.B.A. ethical consideration or disciplinary rule that prohibits simultaneous negotiations or conditional offers. *See* Comment, *Settlement Offers*, *supra* p. 11, at 809. Moreover, one would need a direct pipeline to the brooding

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[5]Surely, no empirical evidence exists to support the Committee's fear that simultaneous negotiations "undermine efforts to make counsel available" in civil rights litigation. The increase in employment civil rights cases in the Third Circuit since the 1977 *Prandini* decision banning simultaneous negotiations has been 136%. *Annual Report of the Director of the Admin. Office of the United States Courts* 146 (1984). By comparison, the Tenth Circuit, which permits simultaneous negotiations, *Stover*, 624 F.2d 127, has experienced a 139% increase in such cases over the same period. *Id.* at 147. The lack of discernible difference between these two circuits with divergent rules suggests that simultaneous negotiations have minimal impact on the willingness of counsel to bring civil rights cases. More generally, in the decade since enactment of § 1988, traditional civil rights cases (voting rights, accommodations, welfare) have actually declined, whereas general civil rights and employment discrimination cases have grown at a phenomenal compound annual growth rate of 7.1%. *Id.* Current practice apparently does not undermine efforts to find available counsel.

omnipresence of the Natural Law to deduce that conditional offers or simultaneous negotiations are "prejudicial to the administration of justice."

Indeed, as we shall argue *infra* p. 31, the abstract concerns of Model Code DR 1-102(A)(5) can just as readily be used to support conditional offers as to ban them: The failure of a defense attorney to actively and vigorously represent his or her client—by failing to determine the client's total liability from relief on the merits and from fees—would also be conduct "prejudicial to the administration of justice." *See* Comment, *Settlement Offers*, *supra* p. 11, at 811.

The New York Opinion I was not without the dissent of a "substantial minority." *Supra* p. 15, at 510. The minority reasoned:

> [S]ome defendants, particularly in an action seeking injunctive relief only, might be willing to settle the merits provided they could eliminate or at least limit their monetary exposure on an award of counsel fees, but that they would be unwilling to settle the merits if they faced uncertain monetary exposure for counsel fees.

Id. at 511.

This Court in *White v. N. H. Dep't of Employment Sec.*, 455 U.S. 445 (1982), echoed and endorsed these sentiments of the minority, stating:

> In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

Id. at 453 n. 15. Thus, while not ruling on the ethics of simultaneous negotiations, this Court acknowledged the basic need a defendant has "to know his total liability from both damages and fees" if there is ever to be a negotiated settlement. *Id.*

In response, the Committee majority issued a "clarification" of its position in a subsequent opinion in which it permitted defense counsel to request plaintiff's counsel to supply information concerning hours spent, customary rates, and any multiplier anticipated, so long as the request or information did not constitute fee bargaining. The New York Bar Association Committee on Professional and Judicial Ethics Opinion No. 82-80 [hereinafter cited as New York Opinion II]. The majority thus made the minimal adjustment required by *White*.

The dissenting minority continued to be concerned with the prohibition against simultaneous negotiation "as continuing to interfere with the right of the defendant to know his exposure, and to insist, if he wishes, on a lump sum settlement inclusive of attorneys' fees." *Id. Accord* State Bar of Georgia Advisory Op. No. 39 (July 20, 1984). A parallel criticism was leveled by the D. C. Circuit in *Moore*, which stated that "[t]his approach is no more satisfactory, however, because it would permit through the back door what was made impermissible through the front. At best, it gives a defendant only a limited indication of his ultimate liability." Slip op. at 24 n. 16.

More realistic is the Final Subcomm. Report of the Comm. on Attorneys Fees, appointed by the Chief Judges of the United States District Court and United States Court of Appeals for the District of Columbia Circuit, Bar

Report 4 (Aug./Sept. 1984) [hereinafter cited as D.C. Circuit Report]. In the "sweetheart" context, the D. C. Circuit Report opined that adequate protection is provided by an informed plaintiff or, in the class action context, by full disclosure to the judge of the terms of all aspects of the settlement and review under Fed. R. of Civ. P. 23(e). *Id.* at 5-6.

In the "sacrifice" context involving conditional settlement offers, the D. C. Circuit Report concluded that the ethics of the situation depends on the circumstances. *Id.* In some situations, particularly where the plaintiff's case is weak, a conditional settlement offer may be entirely proper. Of course, the plaintiff and his or her counsel are free to reject it if they feel the case is of sufficient strength. *Id.* The Report noted:

> The key in these situations is whether the defendants' offer is reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty.

Id.; see infra p. 24.

Clearly there are divergent views reflected in the opinions of the various ethics committees that have addressed the potential conflict of interest problems associated with simultaneous negotiation of both merits and attorney's fees and conditional settlement offers. The diversity of views reveals the complexity of the issues in-

volved. Precisely because of this complexity, a *per se* bifurcated settlement rule is not appropriate.

3. *Most Federal Circuits Have Rejected The Bifurcated Settlement Procedure.*

The Ninth Circuit's decision in *Jeff D.* to ban simultaneous negotiations and to impose a strict bifurcated settlement process relied primarily on the Third Circuit opinion in *Prandini* and on the Ninth Circuit's own earlier ruling in *Mendoza v. United States,* 623 F.2d 1338 (1980), *cert. denied sub nom. Sanchez v. Tucson Unified School Dist.,* 450 U.S. 912 (1981). None of the other circuit courts has been sympathetic to the Ninth Circuit approach and, in fact, a close reading of *Prandini* and *Mendoza* shows that neither of those cases justifies a *per se* rule banning simultaneous negotiations.

In *Mendoza,* an objector appealed a negotiated settlement in a school desegregation class action, providing for injunctive relief and $500,000 in attorney's fees. 623 F.2d at 1342. While agreeing with the objector that simultaneous negotiations were disfavored, the Ninth Circuit nonetheless affirmed the district court's approval of the settlement, finding no improprieties therein. *Id.* at 1353 n. 20. Thus, the *Mendoza* decision actually stands for the proposition that simultaneous negotiations need not be unethical and that a conscientious court is able, on a case by case basis, to ferret out unethical conduct without resort to a bifurcated structure.

In *Prandini,* the defendants settled the merits for approximately 90% of their potential liability, and offered to settle attorney's fees at approximately 80% of the hours

expended times the requested rates.[6] 557 F.2d at 1018. The major issue on appeal was not simultaneous negotiations but the allocation of attorney's fees among the several counsel representing the prevailing plaintiffs. *Id.* The Third Circuit addressed the simultaneous negotiation issue only because of "the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." *Id.* at 1021. Yet, the *Prandini* court could find no ethics opinion or ruling disapproving simultaneous negotiation of the merits and attorney's fees and costs. *Id.* Further, two of the three cases cited by the court were resolved without resorting to a bifurcated settlement process. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ($10 million damages of the settlement affirmed while the $1.5 million to plaintiff's counsel was reduced); *City of Philadelphia v. Chas. Pfizer & Co.*, 345 F.Supp. 454 (S.D.N.Y. 1972) (the court upheld simultaneously negotiated attorney's fee award).

Subsequent Third Circuit panels have shown no inclination to read *Prandini* expansively or to follow it strictly. The *Prandini* doctrine apparently has no vitality in the context of antitrust/derivative action suits. *See In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984). Even in the civil rights area, the Third Circuit appears to be wavering on bifurcation. In *El Club del Barrio, Inc. v. United Community Corps., Inc.*, 735 F.2d 98 (3d Cir. 1984), the court upheld the plaintiff's

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[6]For a complete discussion of *Prandini*, and of the odd outcome of the Third Circuit's modification of the district court's order in that case, see Note, *Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys Fees in a Title VII Class Action*, 51 Temp. L.Q. 799 (1978) [hereinafter cited as Note, *Conflicts*].

right to seek subsequent attorney's fees, but indicated that had a stipulation as to a waiver of attorney's fees been placed in the settlement agreement, such a waiver would have been upheld—a view that cannot be reconciled with *Prandini's* ban on simultaneous negotiations. *Id.* at 101. Finally, the court noted that "*Prandini* may be, as suggested by defendant's counsel, 'more honored in the breach'. But the vitality and scope at *Prandini* are not before this court today." *Id.* at n. 3.

The Eighth Circuit likewise appears to be retreating from an earlier decision favoring bifurcation. In *Obin v. Dist. No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers,* 651 F.2d 574 (1981), the court stated in dicta that application of Fed. R. of Civ. P. 59(e) to an attorney's fee would raise serious ethical problems by requiring counsel to discuss the substantive issues simultaneously with the amount of the attorney's fee award during settlement negotiations. *Id.* at 582. By contrast, in *Young,* 729 F.2d 563 (1984), the Eighth Circuit recently held that when a settlement stipulation purports to resolve *all* issues disputed in the complaint, "the parties should not stipulate to a dismissal without reserving the unresolved issues or in some appropriate way indicating their intent as to such issues." *Id.* at 566, 567 n. 3. When the complaint requests attorney's fees, it would be impossible for future litigants to comply with the ruling in *Young* without injecting the issue of attorney's fees into the settlement negotiations.

Federal courts in seven of the federal circuits have upheld simultaneously negotiated settlements. These include the First Circuit, *Lazar,* 757 F.2d 435 (1985); *White,*

629 F.2d 697 (1980); the Second Circuit, *Malchman v. Davis*, Nos. 84-7589, 84-7669, slip op. at 13 (May 10, 1985); *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881 (1983) *cert. denied*, 104 S.Ct. 1929 (1984); *City of Detroit*, 495 F.2d 448; the Fifth Circuit, *Parker v. Anderson*, 667 F.2d 1204, *reh'g denied*, 671 F.2d 1378, *cert. denied*, 459 U.S. 828 (1982); the Sixth Circuit, *Krause v. Rhodes*, 640 F.2d 214, *cert. denied sub nom. Sindell, Lowe & Guidubaldi v. Att'y Gen. of Ohio*, 454 U.S. 836 (1981); the Tenth Circuit, *Stover*, 624 F.2d 127 (1980); the Eleventh Circuit, *Nat'l Treasury Employees Union*, 735 F.2d 1277 (1984); and the Court of Appeals for the District of Columbia, *Moore*, No. 83-2213, slip op. at 26 (June 4, 1985).

The only reported Seventh Circuit decision to discuss simultaneous negotiations avoided *Prandini* while upholding the simultaneously negotiated settlement. *McDonald v. Chicago Milwaukee Corp*, 565 F.2d 416 (1977).

It is clear that the prevailing mood among the federal circuit courts is that simultaneous negotiations are ethically permissible in civil rights class actions and that existing mechanisms are sufficient to ferret out any unethical conduct without resort to the rigid bifurcation procedure imposed by the *Jeff D.* and *Prandini* courts.

B. Bifurcation of Negotiated Settlements Will Result In Unintended Consequences.

The Ninth Circuit's ban on simultaneous negotiations and its *per se* requirement of a bifurcated settlement structure are intended to eliminate any possible conflict of interest arising between the plaintiff class and plaintiff's counsel. *Jeff D.*, 743 F.2d at 652. However, a change

in structure will also have unintended consequences,[7] including: (1) discouragement of negotiated settlements, and (2) enforcement problems due to pressures placed on both the plaintiff and defense attorneys to evade the imposed bifurcated process. Additionally, bifurcation increases the burdens placed on the courts and prevents any subsequent court reduction in plaintiff's attorney's fees from accruing to the benefit of the plaintiff. Finally, and perhaps most unfortunately, manditory bifurcation "displays an implicit lack of trust in the practicing bar's ability to engage ethically in settlement negotiations." *Moore*, slip op. at 23 n. 15.

1. *A Ban On Simultaneous Negotiations Will Discourage Negotiated Settlements.*

The public policy favoring negotiated settlement of civil rights class actions is severely undermined by the *Prandini* and *Jeff D.* courts' ban on simultaneous negotiation of merits and attorney's fees. Courts, bar committees, and commentators all identify the same reason why a ban on simultaneous negotiations impairs negotiated settlements:

> The subcommittee also recognized that the *Prandini* approach made it more difficult for defendants to

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[7]Sociologist Robert K. Merton observed that practices or structures perform both manifest and latent functions. R. Merton, *Manifest and Latent Functions* in *On Theoretical Sociology: Five Essays, Old and New*, 73 (1967). The manifest functions are "those objective consequences for a specified unit (person, subgroup, social or cultural system) which contribute to its adjustment or adaptation and were so intended." *Id.* at 117. "Latent functions," according to Merton, refer to unintended and unrecognized consequences. *Id.* Merton warned that to ignore the latent consequences of social change would considerably heighten the risk of failure. *Id.* at 135.

> settle cases because they cannot fix their total exposure, unless information about attorneys fees is supplied through the back door.

D. C. Circuit Report, *supra* p. 19, at 6. The D. C. Circuit Court of Appeals recently reached the same conclusion, namely, that adoption of the *Prandini/Jeff D.* rule would deprive plaintiffs of the

> right to waive their statutory fees and costs and force them to negotiate first and exclusively on the merits of the case. Defendants in such cases would be more reluctant to settle at this early stage because of uncertainty about their ultimate liability for attorneys' fees and costs. As a result, many more cases would fail settlement and proceed to trial. Thus, a requirement in every case that merits be discussed and settled first would prove ultimately a disservice to plaintiffs as well as defendants.

Moore, slip op. at 23-24. This same point—that a ban on simultaneous negotiations will hurt plaintiffs as often as defendants—was made even more strongly by Judge Wald in her concurring opinion in *Moore:*

> the *Jeff D.* approach probably means that a defendant who is willing to grant immediate prospective relief to a plaintiff class, but would rather gamble on the outcome at trial than pay attorneys' fees and costs up front, will never settle. In short, removing attorneys' fees as a "bargaining chip" cuts both ways. It prevents defendants, who in Title VII cases are likely to have greater economic power than plaintiffs, from exploiting that power in a particularly objectionable way; but it also deprives plaintiffs of the use of that chip, even when without it settlement may be impossible and the prospect of winning at trial may be very doubtful.

Moore, slip op. at 4 (Wald, J., concurring).

Even the plaintiffs' bar candidly recognizes that a ban on simultaneous negotiations discourages negotiated settlements. As one seasoned plaintiff litigator put it:

> A defendant with good prospects for escaping any significant adverse judgment may be willing to settle only if he knows that his total liability, including fees, will be less than the costs of defending the case. If the potential attorney's award is substantial and uncertain, the defendant may prefer to go to trial.

Interview with Charles Stephen Ralston, NAACP Legal Defense Fund, in New York City, June 25, 1981, reported in Rhode, *Class Conflicts in Class Actions*, 34 Stan.L.Rev. 1183, 1207 n. 15 (1980). *See also* Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized*, 14 Clearinghouse Rev. 515, 517 (October 1980).

In short, it is hard to argue that the discouragement of negotiated settlements is merely an "unintended consequence" of a ban on simultaneous negotiations. On the contrary, it is universally recognized that discouraging such settlements is the direct and inevitable consequence of such a ban.

It is not always appreciated how profoundly a ban on simultaneous negotiations works to undermine the policies embodied in the Act and the civil liberties that Act is designed to protect. The issue is trivialized if it is seen merely as one of choosing between defense counsel's right to know a "bottom line" and plaintiff counsel's need to take a "hard look" at a "hole card." Such "hard bargaining" language does not do justice to the full spectrum of real world negotiations.

Trained negotiators and mediators point out that "[b]ehind opposed positions lie shared and compatible interests, as well as conflicting ones." Fisher & Ury, *Getting to Yes* 43 (1984). This is particularly so in civil rights class action cases where suit is often brought by clients of a public interest law firm against the governmental entity entrusted by law to serve those same clients. In such cases, the governmental defendant may be acutely aware that a given institution suffers from crowded conditions, is understaffed, or needs educational upgrading. One need not be a Pollyanna to see "shared and compatible interests" between plaintiffs and defendants in such suits.

The first step in "principled negotiations" is to identify shared interests. This cannot happen if one is forbidden to discuss them.

> The purpose of negotiating is to serve your interests. The chance of that happening increases when you communicate them. The other side may not know what your interests are, and you may not know theirs. One or both of you may be focusing on past grievances instead of on future concerns. Or you may not even be listening to each other. . . . If you want the other side to take your interests into account, explain to them what those interests are.

Id. at 51. Once the parties' interests are communicated and understood, the key step is to "invent options for mutual and compatible interest" of both the public interest plaintiff and the public servant defendant. Only in this way can the parties maximize benefits from limited resources—which is the genuinely "shared and compatible interest" of both the public interest plaintiff and the public servant defendant.

A *per se* rule that bans simultaneous negotiations and imposes a mandatory two-step bargaining process takes away from both plaintiffs *and* defendants a share of their bargaining chips as they sit at the negotiating table. The policies of the Act are frustrated by the "unintended" but inevitable consequences that result.

First, the parties, both plaintiffs and defendants, lose their ability to invent options for mutual gain if they cannot discuss the total resource package available to the governmental defendant. It is impossible to enlarge the menu of options if presented with a "fixed pie" or a "fixed sum" game. Such situations allow only a "win/lose" outcome, not a "win/win" outcome because they function "as essentially either/or—either I get what is in dispute or you do." *Id.* at 61.

Second, the bottom line benefit to plaintiff is likely to be less. A prudent defense counsel will come in low in a settlement offer on the merits during phase one of bifurcated negotiations in order "to retain an economic 'cushion' to provide for impending attorneys' fees in the second proceeding." Rhode, *supra* p. 26, at 800 n. 12. As in *Prandini* itself, any subsequent court reduction in plaintiff's attorney's fees results in a savings to the defendant, not a benefit to the plaintiff. *Id.* at 812.

Third, when the win/win mechanism of principled negotiations gives way to the win/lose framework of the courtroom, one sows the seeds of future problems. A wise plaintiff knows that ultimate success "depends to a degree on making the other side sufficiently content with an agreement to want to live up to it." Fisher & Ury, *supra* p. 27, at 75. The defendant who simply "loses" and has no say in how limited resources will be put to use, is less likely to be a cooperative problem-solver.

2. ***Bifurcation Creates Pressure On Attorneys For Both Plaintiff And Defendant To Evade The Imposed Process, Leading to Enforcement Problems.***

If the *Jeff D.* ban on simultaneous negotiations seeks to be a "deliberate enactment of social change" rather than a mere indulgence in "social ritual," Merton, *supra* note 7, at 135, then it is important to know whether such a ban will work. The evidence available to date strongly suggests that it will not.

In *El Club del Barrio,* the Third Circuit Court itself noted that "*Prandini* may be, as suggested by defendants' counsel, 'more honored in the breach.' " 735 F.2d at 101 n. 3. The reason for this is clear: Settlement of disputes is in the interest of both plaintiff and defendant. To the degree that a bifurcated process inhibits the parties from negotiating all outstanding issues, they will be motivated to evade bifurcation. Rhode, *supra* p. 26, at 1206-07.

The parties may tacitly negotiate attorney's fees, violating the spirit of the bifurcated process, if not the letter. It has even been suggested that a ban on simultaneous negotiations "contributes to the very improprieties that the court [in *Prandini*] attempted to resolve." Note, *Conflicts, supra* note 6, at 813. Especially where damages are sought, "The bifurcated proceeding may *encourage* collusion between the attorneys in order to effectuate a practical settlement." *Id.* at 800 n. 12 (emphasis added). In other words, if the integrity of the nation's attorneys is not to be trusted, if collusion is an overwhelming temptation, and if the reviewing courts are powerless in the face of such abuse during simultaneous negotiations, then collusion is just as likely to occur during bifurcated proceedings.

Even for counsel of goodwill and integrity, there remains the problem of drawing a line clearly enough so that it can be understood and observed. A. Miller, *Attorneys' Fees In Class Actions: A Report To The Federal Judicial Center*, 223 (July 1980). The boundary line between a mere exchange of information as to the amount of attorney's fees thus far incurred, and outright negotiations in violation of the bifurcation rule, would be difficult to draw. *Moore*, slip op. at 24 n. 16. The enforcement problem was cited by those troubled by the *Prandini* rule in a survey conducted by Miller. *Supra* at 224.[8]

Nor should the impact of bifurcated proceedings on judicial economy be overlooked. The *Prandini* court was sensitive to the burden placed on courts to approve class action settlements under Rule 23(e) and was of the opinion that bifurcation "would make the court's task less burdensome. . . ." 557 F.2d at 1021. The reverse is true. Bifurcation doubles the number of hearings required to approve a class action settlement, thus increasing time, legal expenses and administrative burdens on the courts. Note, *Conflicts, supra* note 6 at 812.

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[8]Third Circuit judges interviewed following the *Prandini* decision had not been requested by a single plaintiff to enforce *Prandini* by instructing a defendant not to discuss fees simultaneously with the merits of the case. Some of the judges noted that simultaneous negotiations were as much in the plaintiff's interest as the defendant's. The judges labeled *Prandini* variously as "a pain," "stultifying" and a "tail wagging the dog." They read *Prandini* as applying narrowly only to its own fact pattern and, in one instance, felt it had been overruled by this Court's opinion in *White*. In short, *Prandini* has been routinely ignored in the only circuit where it has supposedly been in effect. This Court should not embark on a similar exercise in futility nationwide. Comment, *Settlement Offers, supra* p. 11, at 805 n. 90 and interview notes.

C. Defense Counsel In Many Instances, Has An Ethical Right And Duty To Engage In Simultaneous Negotiations.

This case has generated an unprecedented amicus response on the part of defense attorneys throughout the country. What is unprecedented is not the quantity, but the emotional intensity, of the responses. Government attorneys deeply resent having their conduct during negotiations labeled as "sweetheart deals" (or "bribes" or "collusion") on the one hand, and as "sacrifice" extractions (or "extortion," or "duress" or "coercion") on the other.

It is scant comfort to demonstrate, as we have done *supra* p. 10, that their conduct is "not unethical" under the Act. Rather, they perceive themselves as adhering to the highest ethical standards of their profession when they engage in simultaneous negotiations and make lump sum settlement offers or offers conditioned on a waiver of attorney's fees. The more recent, and better reasoned, federal court decisions are coming to this same conclusion.

In the first place, it is recognized that the "administration of justice" is best served by conscientious efforts to settle cases, including attorney's fees, short of litigation. Model Code DR 1-102(A) (5) (1981).

> Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved. In these days of crowded court calendars, complex disputes, and tardy results, there can be no doubt but that the voluntary resolution of litigation through settlement, constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the

> judicial system. The removal of attorney's fees from the arena of voluntary and ethical negotations in civil rights cases would present an unnecessary discouragement to non-litigious disposition of these controversies.

Lazar, 757 F.2d at 440 (Torruella, J., concurring) (footnote omitted).

Ethical defense counsel, in attempting to provide "the best quality of justice" to the system and "the highest service" to his or her client, will often be required to engage in simultaneous negotiations because a "defendant may have good reason to demand to know his total liability from both damages and fees." *White,* 455 U.S. at 453 n. 15.

This principle holds true regardless of whether the case involves damages or injunctive relief.

> A settlement package of a civil rights action may consist of one or more of the following items: (1) monetary damages, (2) equitable relief, (3) costs and (4) attorney's fees. In settling a case for his client, a defendant's counsel does his client a disservice if he settles a case as to one or more of these items, but leaves open the possibility of further recovery or action on any of the remaining ones. Within the bounds of ethics and fair play, an attorney owes a positive duty to his client to reduce his liability and his exposure to recovery, to the limits of the attorney's ability. This applies to all the items as to which judicial relief can be sought.

Lazar, 757 F.2d at 439 (Torruella, J., concurring). This is the sore spot. Defense counsel who strive to "represent a client zealously within the bounds of the law" know that they owe their clients "a positive duty" to explore and limit all aspects of their clients' liability. Model Code,

Canon 7 (1981). They are incensed when, in carrying out that affirmative duty, they are reported to a bar committee for unethical conduct.

Nor is defense counsel's ethical conduct transformed into unethical behavior merely because it creates an ethical dilemma for plaintiff's counsel. To be sure, as this Court recently noted in the Rule 68 context, an offer of settlement "will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile," and may "serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer." *Marek*, 53 U.S.L.W. at 4906. But that is simply an inevitable fact of life when parties swap settlement offers.

> It has long been recognized that any agreement concerning plaintiff's attorney's fees, entered in the course of settling litigation, poses a danger of pitting the interests of the plaintiff in receiving a recovery against the interests of the plaintiff's attorney in receiving a fee. The tension between their interests exists even in the garden-variety tort cases in which the attorney has an agreement to receive a contingency fee at a stated fraction of the recovery.

Malchman, slip op. at 16 (Newman, J., concurring). Thus, potential ethical conflict between plaintiff and plaintiff's attorney is not the fault of defense counsel "in the garden-variety tort cases" when a common fund is at stake. Neither is it the fault of defense counsel in cases where "injunctive relief" is at stake, because "it is unrealistic to expect [the defendant] to agree to a settlement concerning the injunction terms until he knows the limit of his exposure for the attorney's fees." *Id.*

In short, settlement offers by defense counsel frequently pose ethical dilemmas for plaintiff's counsel. Ethical

counsel for plaintiffs and defendants cope with and resolve these dilemmas every day of the week in every law office across the land. In settling class action lawsuits, they routinely negotiate both the merits and the attorney's fees without any allegations of ethical misconduct. Indeed, the *Manual for Complex Litigation* expressly disapproves any other approach to class action settlements.

> Such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement fund and should be known and disclosed at the time the fairness of the settlement is considered. . . . Only if the agreement of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment about the fairness and reasonableness of a proposed settlement.

§ 1.46 (1982).

There is no reason to suspect that counsel in civil rights class action lawsuits are any less ethical than their counterparts in other areas of law. It is an "excess in paternalism" to suggest that the entire judicial settlement process is in need of overhaul to prevent unethical conduct on the part of civil rights counsel. *Lazar,* 757 F.2d at 439 (Torreulla, J., concurring). As this Court held in *Marek,* there is no evidence whatsoever "that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." 53 U.S.L.W. at 4906.

D. District Courts Have The Necessary Tools To Uncover And Excise Unethical Conduct.

In those rare instances where unethical conduct may exist, "any unreasonable conduct that arises will be kept

in check through the district court's exercise of its Rule 16 and 23 powers if promptly brought to the court's attention." *Moore,* slip op. at 23 n. 14. However, the argument here must not be read as sanctioning or encouraging routine recourse to district court for exercise of its Rule 16 and 23 powers. The district court is not a mere bargaining chip on plaintiffs' side of the negotiating table, but an umpire of last resort when the rules of the game break down.

Thus, the services of the district court should be available to plaintiff's counsel only upon a showing that settlement offers by defense counsel have not been made in good faith. This means that the district court must not begin, as did the *Jeff D.* court and the dissent in *Moore,* with the attitude that "attorneys' fees settlements contained in simultaneously negotiated settlements [are] presumptively invalid absent 'unusual circumstances.'" *Moore,* slip op. at 23 n. 15. Put indelicately, this means, in the "sacrifice" context, that the court must not start with the presumption that defense counsel has been guilty of "extortion threats," or "coercion" or "duress."

Instead, the starting-point must be a presumption that defense counsel is engaged in good faith negotiations.

> The purpose of *defendants'* settlement offers which include fee provisions is not, in most cases, to create an attorney-client conflict. Nor is it to punish or deter plaintiffs' attorneys from taking on fee-shifting cases. Generally speaking, defendants make such offers to limit their total exposure; this could not occur in a bifurcated settlement process. This is true irrespective of whether the settlement involves monetary or injunctive relief. Fees and costs, always being monetary in nature, do not depend on the nature of the merits relief.

Id. at 21-22 n. 14, citing D.C. Circuit Report at 21-22 (emphasis in *Moore* opinion).

Plaintiff's counsel should have the burden of overcoming the presumption that defendants' settlement offers are made in good faith. In the "sacrifice" context, the burden would ordinarily be met when an offer, on its face, makes a "totally inadequate provision for class counsel." Rhode, *supra* p. 26, at 1207. Similarly, the burden would be met when defense counsel really has no defenses, e.g., where plaintiff's type of complaint has been frequently, and successfully, litigated in other jurisdictions. In such instances, defendant's insistence upon a waiver of attorney's fees as a condition for settlement on the merits may warrant exercise by the district court of its review powers under Rule 16 and 23.

Conversely, the district court should not allow itself to be drawn into the negotiating process on either side of the table when there is evidence that plaintiff's waiver of attorney's fees represents smart use of a bargaining chip in obtaining a *quid pro quo, Moore,* slip op. at 11; or when success on the merits is highly speculative if the case should go to trial; or when defendants of limited resources have voluntarily offered more relief than prayed for in the complaint. In all of these instances, waiver of attorney's fees by plaintiff's counsel may be seen as generating a result "bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal." *Saylor v. Lindsley,* 456 F.2d 896, 900 (2d Cir. 1972). The district court should also refrain from exercising its powers under Rule 16 and 23 when "neutralizing" elements, such as the

presence of objective third parties, safeguard the process, *Mendoza,* 623 F.2d at 1353.

When plaintiff succeeds in calling into question the good faith of defendant's settlement offers and when no obvious explanation of those offers is immediately forthcoming, then the district court is justified in exercising its powers under Rule 16 and 23 to determine whether such offers mask unethical behavior on the part of defendant. The court's powers, under those rules are adequate to deal with any problems that may arise, without recourse to *per se* rules that restructure the entire negotiation process.

For example, under Rule 23(e), the district court may preside over "an on-the-record conference to discuss the status of the case, including any particular dilemma involving simultaneous negotiations." *Moore,* slip op. at 25 n. 17. The district court may also use the services of a magistrate judge or of a special master to examine allegations of unethical conduct. *Manual for Complex Litigation* § 1.47 (1982). In addition, the court may appoint a guardian *ad litem* to protect the interests of plaintiffs if it becomes clear that a settlement offer has driven a wedge between those plaintiffs and plaintiff's counsel. *Haas v. Pittsburg Nat'l Bank,* 77 F.R.D. 382, 383 (W.D. Pa. 1977).

Similarly, in nonclass actions, plaintiffs may invoke Rule 16 to secure judicial scrutiny of settlement proposals. Rule 16(a) (5) allows the court, at its discretion, to conduct pretrial conferences to facilitate the settlement of cases. Under Rules 16(c)(7), the pretrial conference participants may consider or take action with respect to the possibility of settlement. These Rule 16 provisions per-

mit the court to intervene if it feels that conflict of interest problems are present in settlement negotiations. *See Moore,* slip op. at 6 (Wald, J., concurring). In addition, some authorities have suggested that district courts may exercise their discretion to reject settlements that undermine the congressional intent of the Act. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988,* 55 U.Colo. L.Rev. 341, 358-359 (1984).

The existing rules of federal procedures thus provide both a powerful and a flexible mechanism for reviewing allegations of unethical behavior in the settlement process. In the class action context, Rule 23(e) is tailored to respect the fact that:

> [e]ach negotiation, like each litigant, is unique; reasonableness can only be determined by looking at the strength of the plaintiff's case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did.

Moore, slip op. at 5 (Wald, J., concurring).

Rather than devising inflexible prophylactic rules that impugn the integrity of the legal profession and the discretion of the district courts, appellate courts should insist that district court judges conscientiously perform their duties under the federal rules.[9] In particular, the Ninth

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[9]It bears repeating here that a district court's exercise of its powers under Rules 16 and 23 to intervene in the negotiation process should be a rarity. As this Court warned in *Hensley v. Eckerhart,* "a request for attorney's fees should not result in a second major litigation." 461 U.S. 424, 437 (1983). Even with $2.3 million in attorneys' fees on the table, the Second Circuit cautioned a district judge not to "convert settlement hearings into mini-trials on the merits." *Malchman,* 706 F.2d at 433.

Circuit's attempt to impose a *per se* rule requiring bifurcated negotiations should be rejected.

II.
The Court Of Appeals Erred In Enforcing The Merits Portion Of The Negotiated Settlement While Reversing The District Court's Approval Of The Attorney's Fee Waiver.

The Ninth Circuit Court of Appeals in the present case found, without examining the factual record, that the respondents were "prevailing parties" and entitled to attorney's fees under the Act. 743 F.2d at 650. Relying on the legislative history of the Act and this Court's opinion in *Hensley,* the appellate court reasoned that the district court was "obliged" to award attorney's fees. *Jeff D.,* 743 F.2d at 651. The Ninth Circuit then "reversed and remanded for determination of reasonable attorney's fees." *Id.* at 652. In doing so, the court failed to find that the district court abused its discretion either in approving the settlement or in denying respondents' request for attorney's fees. Rather, the Ninth Circuit voided the provision of the settlement whereby respondents waived the right to claim fees, left the remainder of the settlement intact, and prohibited the district court from exercising its discretion to determine whether respondents are entitled to attorney's fee on remand. In each of these actions, the Ninth Circuit committed reversible error.

A. The District Court Did not Abuse Its Discretion In Approving The Settlement.

The basic organizational structure of the federal judiciary requires that an appellate court give due deference and appropriate respect to the exercise of discretion by a trial court judge. *Webb v. Dyer County Board of Educa-*

tion, 53 U.S.L.W. 4473 (U.S. April 17, 1985). Under Rule 23(e) in particular, the district court protects unnamed or incompetent class members by determining whether a proposed settlement of a class action, taken as a whole, is fair, reasonable, and adequate to all concerned, and is not the product of fraud, overreaching or collusion. *Moore,* slip op. at 26; *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).

In challenging court approval of a class action settlement agreement, an objector bears the burden of making a clear showing that the district court abused its discretion. *Moore,* slip op. at 27; *City of Detroit,* 495 F.2d at 455. Absent a strong showing that the district court abused its discretion, the court of appeals should not reverse. *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco,* 688 F.2d 615, 626 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n of the City and County of San Francisco,* 459 U.S. 1217 (1983). "We are not to substitute our notions of fairness for those of the district judge and the parties to the agreement. . . . Consequently, we will reverse only upon a strong showing that the district court's decision was a clear abuse of discretion." *Id.* at 626.

As this Court stated in *Blum v. Stenson,* 104 S.Ct. 1541 (1984), "A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness. The court, with its intimate knowledge of the litigation, has a responsibility to encourage agreement." *Id.* at 1550 n. 19.

The Ninth Circuit in this case strayed far from these accepted standards of appellate review. Rather than reviewing the complex record before the district court and

ruling on that court's specific exercise of discretion under Rule 23(e) the appeals court ruled on a generic one-dimensional question more to its own liking:

> The question here is whether the court in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorney's fees *simply because it was part of the settlement* to which the parties had agreed.

743 F.2d at 650 (emphasis added). The appeals court then answered that question in the negative and chastized the district court for its failure to perform its "duty to review the reasonableness of *all the terms* of class action settlement agreements, particularly those related to attorney's fees." *Id.* (emphasis added). A review of the record demonstrates that the district court did not approve the waiver "simply because it was part of the settlement," but rather because it found the proposed settlement, taken both as a whole and in all its individual terms, was fair, reasonable and adequate to all concerned and was not the product of fraud, overreaching or collusion. (J. A. 93-94).

The district court, at the time of its approval of the stipulation settling the controversy, had been in close contact with the case and the parties over a three-year period. Counsel for both parties actively negotiated attorney's fees and the merits of this case. (A. 5, 8-9, 16); *see supra* pp. 2-7. The language waiving attorney's fees incorporated in the consent decree settling the education claims, entered on October 19, 1981 (J. A. 54), was identical to that proposed *by respondents themselves* in their proposed stipulation of July 14, 1981. (A. 50). In reference to the proposed stipulation settling the remaining mental health claims and containing the same attorney's fees

waiver clause, attorney for respondents himself stated in a letter of November 30, 1981:

> It is my personal view that the negotiations conducted to date have been productive, fair with respect to our relative interests and marked by meaningful concessions from both sides.

(A. 18-19). The attorney's fee waiver language proposed by petitioners during the subsequent 1982-83 phase of the mental health negotiations mirrored that proposed by respondents during the 1981 mental health and education negotiations. (A. 18). The district court was fully advised of these negotiations and thoroughly reviewed the settlement and all of its components for reasonableness, fairness and adequacy at two separate hearings. (J. A. 88); *see supra* note 1. The final settlement decree in this case, by the Ninth Circuit's own admission, resulted in greater relief for the plaintiff class than the district court during earlier hearings had indicated it was willing to grant. *Jeff D.*, 743 F.2d at 650.

The programs made available to members of the plaintiff class are particularly expensive, with one involving average monthly costs of $43,000 to serve an average of twelve full-time and two part-time patients. Plaintiff's next friend was well aware of the limited financial resources at the disposal of defendant and bargained accordingly. (A. 10).

As early as April 3, 1981, counsel for defendants/petitioners had informed plaintiffs/respondents that:

> Any further concessions will be at the cost of services to other segments of its client population. . . . The state will not take service resources from other groups and tailor special programs for juveniles—programs requiring a high level of financial resources as mea-

> sured by limited populations and limited effectiveness.

(A. 9). Counsel for respondents in his letter of November 30, 1981, acknowledged that these concerns were in the forefront of the bargainers' minds during negotiations:

> Above all, I believe we have succeeded in resolving some very difficult points so as to place the minimum possible burden on the Department's [Department of Health and Welfare's] limited resources.

(A. 19). Based on the stipulation, the pleadings, the documents and the briefs filed with the court, as well as the oral arguments presented by both parties at two separate hearings, district court Judge Callister denied plaintiff's attorney's motion for fees and costs. (J. A. at 106).

A review of the record thus demonstrates that the district court in this case did not approve the waiver of attorney's fees "simply because it was part of the settlement to which the parties had agreed." 743 F.2d at 650.[10] On the contrary, the district court examined the prayer of relief in plaintiffs' complaint, the process of negotiations thereon, the likelihood of success if the case went to trial, and the relief voluntarily granted by defendant. In light of all these factors, the court concluded:

> I am of the opinion that it doesn't violate any ethical considerations for an attorney to give up his attorney

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[10]It is unfortunate that the Ninth Circuit's misstatement of the record in this regard has received such wide publicity. The *Moore* court distinguished its own case because "unlike *Jeff D.*, the trial court here conducted an extensive assessment of the reasonableness of all aspects of the settlement under Rule 23, including the waivers." The district judge in *Jeff D.* also performed his duties in a thorough manner.

> fees in the interest of getting a better bargain for his client.

(J. A. at 93).

In so ruling, the district court did not abuse its discretion. Rather an award of attorney's fees in this case would be patently unjust. Petitioners went to the bargaining table with the expectation that in exchange for various promises, respondents would not ask for attorney's fees; the district court had granted partial summary judgment eviscerating much of the complaint (J. A. 56); after the settlement was approved, this court ruled that the remaining state claims were beyond the jurisdiction of federal courts *Pennhurst v. Halderman,* 465 U.S. 89 (1984); even as to the "constitutional right to treatment" claim, the complaint failed to allege that the care violated the standard of generally accepted professional practice—the minimal requirement for relief as announced in *Youngberg v. Romeo,* 457 U.S. 307, 323 (1982); and the Ninth Circuit Court of Appeals recognized that the relief contained in the settlement was more than the district court would have granted at trial. *Jeff D.,* 743 F.2d at 649-50.

For the Ninth Circuit to reverse the district court's ruling that upheld the waiver of attorney's fees by plaintiff, without ever reviewing the factors that went into that ruling and without finding that the district court abused its discretion, is plain error.

B. The Court Of Appeals Erred By Forcing Petitioners To Abide By Their Settlement On The Merits While Directing The District Court To Award Attorney's Fees To Respondents On Remand.

The Ninth Circuit Court of Appeals compounded its error of reversing the district court on the attorney's fees

issue by directing the district court on remand to award "reasonable attorney's fees" while leaving intact the settlement on the merits. In doing so, the Ninth Circuit neatly robbed the petitioners of their *quid pro quo*. Petitioners' settlement offer on the merits was conditioned on a waiver of respondents' attorney's fees precisely because the relief granted to the plaintiff class was more than that sought by its attorneys and more than the district court had indicated it was willing to grant if the case had gone to trial.

The Ninth Circuit's decision would do to the petitioners what the district court could not itself do in reviewing a proposed settlement under Rule 23(e). The district court, reviewing a proposed settlement under Rule 23(e), is cautioned not to try the case or reach any ultimate conclusions on contested issues of fact and law that underlie the merits of the dispute. *Grunin*, 513 F.2d at 123; *City of Detroit*, 495 F.2d at 456; *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971). Instead, the district court must approve the entire settlement or reject it; the court is not free to pick and choose, leaving some elements of the negotiated settlement in place, while redrafting others to its own satisfaction. This was clearly the understanding of Judge Calister at the Rule 23(e) hearing held on April 28, 1983.

> [T]he state was not willing to concede that they were obligated to do the things that they were doing . . . but they were willing to do them as long as their costs were outlined and they didn't face additional costs, but they indicated that they only submitted upon the stipulation that there would be no attorney's fees paid.
>
> My viewpoint is that they are in a position to say, if I say attorney's fees will be allowed, to withdraw the stipulation and put us to trial . . . .

(J. A. at 93).

The court later took the extraordinary step, on August 29, 1983, of sending a letter to Mr. Johnson, explaining why the provisions of the settlement agreement were not severable:

> The defendants entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees and advised the court that if there was going to be attorneys fees that they wanted to proceed to trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect.

(J. A. 115). Similarly, on appeal, the appellate court must consider the effect of the settlement as a whole and is not free to delete, modify or substitute certain provisions of the settlement. "The agreement of the parties must stand or fall as a whole." *Cotton*, 559 F.2d at 1331-1332.

Allowing modification of the settlement as was done by the Ninth Circuit in this case, violates the congressional scheme of providing for relief for civil rights violations and encouraging settlements. The D. C. Circuit Court of Appeals recently rejected the suggestion that either a district or an appellate court can modify individual components of a package settlement:

> a court need not compound error by *unilaterally* modifying a settlement which originally contemplated payment of *no* fees. The rule Moore advocates would result in the alteration of a material part of the Consent Decree which was a condition to its very acceptance by NASD. Granted, a court may modify a fee award, under its authority to oversee such awards, where the parties contemplated payment of reasonable attorneys' fees. It does not follow, though, that a court should necessarily *impose* a fee award where the parties ex-

> pressly waived fees. To do so would undermine the settlement process.

Moore, slip op. at 34-35 n. 21 (emphasis in original). The Ninth Circuit would allow civil rights plaintiffs to seduce defendants into settling with the promise of a fee waiver, knowing that the terms of the settlement may be unilaterally rewritten by the district or appellate court to expunge the waiver while leaving the remainder of the "settlement" intact.

C. The Court of Appeals Erred by Depriving The District Court Of Its Discretion To Award Or Deny Attorney's Fees On Remand.

The Ninth Circuit in this case remanded the matter to district court "for determination of reasonable attorney's fees." *Jeff D.,* 743 F.2d at 652. The Ninth Circuit thereby violated a fundamental principle of the Act which states that an award of attorney's fees is not mandatory but rests in the sound discretion of the district court. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 416 (1978).

In two previous cases, this Court recognized that the Act's authorization of attorney's fees is not absolute and that a denial of fees should be upheld if an award is "unjust" or "unfairly surprises or prejudices" the opposing party. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968); *White,* 455 U.S. at 454.

Two lower courts have upheld denials under this standard in similar circumstances. In *Stover,* 624 F.2d 127, the settlement was silent on the issue of fees. The court remanded the case for a factual inquiry as to whether the parties intended to include fees in the agreement or whether the plaintiffs misled the defendants, which might

constitute a "special circumstance" under *Piggie Park*. *Id.* at 132. In *Lazar,* notwithstanding a waiver provision in the settlement, the plaintiffs moved for attorney's fees. The court upheld the denial of attorney's fees because plaintiff's counsel had misled the opposing parties to obtain the settlement on the merits. The court held that such conduct amounted to "a 'special circumstance' in which a prevailing plaintiff should not recover fees." 757 F.2d at 439.

The *Lazar* court observed that if plaintiff's counsel had ethical concerns, he could have sought guidance from the district court. *Id.* at 437. In the instant action, the parties sought such guidance and, as the Ninth Circuit itself acknowledges, "plaintiffs' counsel did indicate willingness to forgo [sic] fees if the court approved." 743 F.2d at 650. The district court, relying on this announced willingness of plaintiff's counsel to waive his attorney's fees in exchange for a "better bargain for his client" (J. A. at 93), found the waiver ethically acceptable and approved the stipulation. (J. A. 93-94, 106).

The Ninth Circuit summarily declared plaintiffs to be "prevailing parties" and prevented any inquiry on remand into the propriety of plaintiff counsel's conduct on the ground that "The principle that generally binds lawyers and litigants to stipulation has limited applicability to the present situation . . ." 743 F.2d at 650. The Ninth Circuit grounded this startling ruling only on "the clear public policy of 42 U.S.C. 1988 to award reasonable attorney's fees in civil rights actions. *See Hensley v. Eckerhart*, 103 S.Ct. at 1937." *Id.*

The reasoning of the *Lazar* court is more persuasive. *Hensley* does not stand for the proposition that attorney's fees are mandatory in all civil rights actions, much less for the proposition that attorney's fees cannot be waived in exchange for a better bargain for one's clients. Indeed, *Hensley* expressly recognizes that "special circumstances" may exist justifying denial of attorney's fees entirely. 461 U.S. at 429. Thus if this court determines that the present case must be remanded to district court, it should allow that court to exercise its full discretion in determining whether plaintiff is a "prevailing party" at all, and, if so, whether plaintiff's counsel's conduct nonetheless amounted to a "special circumstance'' warranting denial of attorney's fees.

—o—

CONCLUSION

This Court should reverse the Ninth Circuit Court of Appeals on all counts and reinstate the district court's order approving the stipulation settling the mental health claims, including respondent/plaintiffs' attorney's fee waiver. In so doing, this Court should determine that simultaneous negotiations of the merits and attorney's fees are proper when ethically conducted and should be presumed to be so absent a showing to the contrary.

If this Court should hold that simultaneous negotiations are improper, then petitioners/defendants must be allowed to either return to the bargaining table or to determine the controversy at trial. Under no circumstances should this Court permit the settlement as to the merits

to be severed from that on attorney's fees with a subsequent expansion of attorney's fee liability. Only by knowing the total extent of their liability will defendants be encouraged to settle civil rights disputes.

Respectfully submitted,

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Counsel for Petitioner

*Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO. 80-4091

STIPULATION

COME NOW the parties to the above-entitled action, by and through their respective counsel, and hereby stipulate as follows:

* * *

12. Defendants Idaho State Department of Health and Welfare, Milton G. Klein, George Bachik and Carroll Elmore stipulate and agree to:

a. Prohibit the admission to State Hospital South of Plaintiffs under seventeen (17) years of age, or members of the class they represent under seventeen (17) years of age, committed to the Idaho State Department of Health and Welfare under the Youth Rehabilitation Act and the Child Protective Act.

b. Prohibit the admission of Plaintiffs, or any individual, under seventeen (17) years of age to State Hospital South under any other authority, unless: there is a court order authorizing admission for purposes of examination, or there is a certificate of a designated examiner, as defined in Title 66, Chapter 3, Idaho Code, determining that admission to State Hospital South is appropriate for the clinical needs of such individual.

c. Encourage the development of community psychiatric facilities through the planned facility at the North Idaho Children's Home.

d. For each plaintiff admitted to State Hospital South, develop an individualized treatment plan meeting the requirements of "Rules Governing Hospitals," Title 2, Chapter 1, Rules and Regulations of the Department of Health and Welfare.

e. Provide treatment and related services to each individual admitted pursuant to paragraph 12(b) to State Hospital South as recommended by the individualized treatment plan.

f. Discharge all plaintiffs and the class they represent not admitted in accordance with the provisions of paragraph 12(b) on or before December 31, 1981.

13. Each party shall bear all costs and attorneys fees incurred in this action.

DATED this —— day of March, 1981.

March 26, 1981

Jim Wickham
Steve Berenter
Deputy Attorney Generals
450 W. State Street, 7th Floor
Boise, Idaho 83720

Re: *Stipulation in Jeff D. v. Evans*

Dear Mr. Berenter and Mr. Wickham:

You will find enclosed the STIPULATION enlarging time to respond to Motion for Preliminary Injunction.

I have reviewed your copy of the STIPULATION in settlement of this controversy. The good news is that the

Education portion is basically agreeable and the bad news is that the Health and Welfare portion is insufficient, at this point, for stipulation.

First, the good news on the Education portion. There are three minor changes that must be made, and these are as follows: First, there must be a limitation as to the number of students in each class. This could be included in paragraph 11(d) of your stipulation by the addition of a paragraph "v. class size and number of students per teacher." Second, there must be included a paragraph to encourage transfer of students to the less restrictive environment of a school district with all deliberate speed. I propose the insertion of language similar to paragraph 4 E(6) and E(7) of my stipulated Consent Decree, to be added as a new paragraph 11(f) to your Stipulation as follows:

> Defendants shall seek out and develop educational services in the community schools of the local school districts for plaintiffs who are able to take advantage of such educational services with the goal of providing such educational services to the plaintiff class in the community schools of the local school districts as soon as practical. Thus, Defendants shall advise the local school districts of the number of school-age plaintiffs being prepared for transfer to the community schools and shall supply the local school districts a projected timetable for such transfers.

Third, a new paragraph 11(g) should be added (to protect the Department of Education) as follows:

> The Department of Education shall ensure the establishment of the grievance procedure, with surrogate parents where appropriate, as required by the Education for All Handicapped Childrens Act, (20 U.S.C. § 1401 et seq.; see e.g. 20 U.S.C. § 1415 and 45 C.F.R.

parts 84 and 121 a.504 through 512 regarding the grievance procedure, and 20 U.S.C. § 1415 and 45 C.F.R. part 121 a.514 regarding surrogates) now or as hereinafter amended to ensure that, in any case, there is some method for addressing problems in each individual's Individual Education Plan. All complaints with an individual education plan will be processed using this procedure. However, all complaints that reflect problems of the plaintiff class that are addressed in this Stipulation may be placed before this court for resolution, by contempt sanction or otherwise.

Second, as to the Idaho State Department of Health and Welfare, there are rather significant problems. To wit:

First, after much consideration and research, I have decided that the minimum basic age for placement of juveniles at State Hospital South (paragraph 12a in your stipulation and paragraphs 4A1 and 2 in my stipulation) must be eighteen (18) years of age (see e.g. Idaho Code § 66-318). However, I am willing to consent to those younger than eighteen (18) years being there in exceptional circumstances. These are: a court order, which authorizes placement at State Hospital South *and* a certificate of a designated examiner, as defined in Title 66, Chapter 3, Idaho Code, determining that State Hospital South is the only appropriate placement for the individual.

Second, (and related to the above) there must be segregation of those under age twenty-one (21) from those over age twenty-one (21) as discussed in paragraph 4(A)(2) of my Stipulated Consent Decree and the Preliminary Injunction.

Third, the provisions of paragraph 4(B) (1), 2(b) only, 3 and 4 of my Stipulated Consent Decree, and paragraph

12(f) of your Stipulation (as amended by this letter) must be included in any Stipulation. This will provide some timetable for providing services to these juveniles.

Fourth, for purposes of encouraging this settlement only, I am willing to drop my paragraphs 4(C) and 4(D) except for paragraphs 4(C) (2) (g), (h) and (j) and 4(D) (1), (5) and (6) in exchange for your paragraph 12(d).

Fifth, there must be included in the Stipulation paragraph 4(F) of my Stipulated Consent Decree, or a reasonable provision reflecting these provisions.

Lastly, as to both your clients, the provision contained in paragraph 4(G) of my Stipulated Consent Decree, or a reasonable alternative, must be included. In light of these problems, there can be no Stipulation on your paragraph 13 at this time.

Please let me know your response to these proposals within five (5) days of your receipt of this letter. I will, at that time, decide whether further negotiation is possible or whether the Preliminary Injunction Motion should be noticed for hearing.

Please be advised, however, that I am willing to entertain a Partial Consent Decree on certain issues involving all the parties.

If you have any questions or comments, please call or write.

Sincerely,

/s/ Charles Johnson
Attorney for Plaintiffs

Through the desk of:

/s/ Russell E. Webb
Attorney for Plaintiffs

A. 6

April 3, 1981

Charles Johnson, Esq.
Idaho Legal Aid Servces, Inc.
P. O. Box 1136
Idaho Falls, Idaho 83401

Dear Charlie: RE: Jeff D. v. State

As I read your letter of March 26, 1981, you are demanding:

> (1) No admissions to State Hospital South (SHS) of persons under eighteen (18) years of age without court authorization and a designated examiner's certificate that placement at SHS is the *only* appropriate placement.

This ignores the duty of parents to secure needed care for their dependent children; it ignores the duty of the state to seek private arrangements in lieu of formal intervention through commitment; it ignores the fact that placement at SHS may be the best placement in light of the paient's clinical needs even though SHS will never be the *only* appropriate placement; it ignores the months of debate involved in the development of Senate Bill 1019. Even the *Pennhurst* court allowed institution placements on a voluntary basis and where clinically appropriate.

> (2) Total segreation of patients over and under tweuty-one (21) years of age.

A more arbitrary demand would be difficult to imagine. The age of twenty-one has no relation to legal majority, or to clinical effectiveness. Why not segregation of those over and under eighteen, the age of majority; over and under twenty-two (22), the age extinguishing the duty to educate; over and under sixty-two (62), the age of retirement; if sex is a hang-up, why not over and under forty-five (45), the age of menopause? It ignores the clinical

and physical resourcese at SHS. The demand dequires separate clinical, living, recreational and all other resources. Your letter indicates much research—if our legal position is as poor as you apparently believe, I would appreciate knowing of the authorities so that we can avoid future litigation. Other than 16-1812A, *Idaho Code* [which is directly rebutted by 16-1832(c)], your brief in support of your motion for preliminary injunction did not include a single authoritative reference. Integration of patients will be one of the factors considered in determining the appropriateness of placement at SHS.

(3) A full range of community-based services.

As indicated by our proposed stipulation transmitted to you March 23rd, the Department of Health and Welfare is committed to continue providing a full range of community services for juveniles and to develop in-patient psychiatric services through the NICH facility. Any other in-patient psychiatric services will require amendments of the state's Medicaid plan and/or Title XIX of the Social Security Act. In our discussions, it was felt that the NICH facility would satisfy your demands for in-patient psychiatric facilities.

(4) Return of out-of-state children by December 30, 1984.

It is unlikely that the state will ever have the capability of providing unique facilities for all the needs of children such as those currently placed out of state. Moreover, since under 94-142 and 504 the state must contract with out-of-state facilities to provide related services unavailable in-state, it is, in my opinion, unlikely that the court will absolutely prohibit the use of out-of-state facilities. Again, if you have any authority to the contrary, I will be glad to re-evaluate my position.

(5) Development of a full-range of community-based services.

Again, with the exception of in-patient psychiatric facilities, our discussions have given us no indication of other services not provided.

(6) Quarterly review of Individualized Treatment Plans (ITP) with patient involvement, discharge plans; ITP assessment of placement and ITP release criteria.

I am advised that the ITP's are reviewed monthly and that the clinical record, of which the ITP is a portion, includes this material. Perhaps if there is a specific problem with these items we can address it rather than argue about something that is already provided.

(7) Incident reports.

There is no objection to putting copies of incident reports in the clinical records, although the progress notes contain the same information.

(8) ITP's developed by child psychiatrists and/or psychologists.

Due to the lack of child psychiatrists and psychologists, the state is unable to comply with this demand. Moreover, since admission will be limited to those for whom services at SHS are appropriate, this demand would appear unnecessary.

(9) Indefinite reporting.

While the state is willing to make reports until compliance with any time table, it would be unreasonable to require semi-annual reports in perpetuity.

(10) Attorneys fees and costs.

If you desire to preserve your right to seek fees and costs in the unlikely event enforcement proceedings are required, the state is willing to modify its position to the ef-

fect that all parties bear their own costs and fees thus far incurred.

Charlie, I believe the state has made some major concessions as a result of this action. Not only will it no longer admit youth rehab. and child protection children so long as SHS has no juvenile psychiatric services, but it has increased its emphasis on providing mental health services to kids. Any further concessions will be at the cost of services to other segments of its client population. The state will not reduce the number of adult psychiatric beds necessitated by a demand for segregation. The state will not take service resources from other groups and tailor special programs for juveniles—programs requiring a high level of financial resources as measured by limited population and limited effectiveness.

It appears in the best interest of all parties to initiate a dialogue to resolve any remaining issues. Perhaps it would be beneficial to meet with you and Mr. Webb, Mr. Bachik, Carroll Elmore and Mr. Antram to discuss the problems involved in this process.

Sincerely,

/s/ James Wickham
Deputy Attorney General

May 15, 1981

James Wickham
Steve Berenter
Deputy Attorney Generals
Boise, Idaho 83720
Re: *Jeff D. v. Evans,* Case No. 80-4091

Dear Mr. Wickham and Mr. Berenter:

Mr. Wickham will find enclosed the original and Mr. Berenter will find enclosed a copy of the revised Stipulation

and Consent Decree in this matter. In light of the negotiations and communications that I have had with each of you to date, a final total settlement of this controversy involving all the parties is possible. The enclosed resulting document is self-explanatory; however, I will address in this letter two concerns that may, to each of your departments, prevent settlement.

In my conversations with Mr. Wickham on May 7, 1981, the changes that I made in the Stipulation were discussed. Most of these changes presented and should present little or no difficulty. However, Mr. Wickham indicated that the Idaho State Department of Health and Welfare is unable or unwilling to provide board certified child psychiatric professionals to the plaintiff class, not only for treatment purpos s, but also for evaluation purposes leading to the establishment of a treatment plan. Obviously, without these specialists, what treatment that is made available will be questionable at best. Equally obvious, however, is the lack of resources in the State of Idaho. By way of compromise, the plaintiff class is willing to stipulate that a board certified child psychiatric professional only be required for evaluation purposes leading to the establishment of a treatment plan; and hence, only a person who "specializes" in the area of child psychology (without any other credentials or board certification) be required for the actual treatment purposes. See e.g. paragraphs 12.d.1 and 12.e.1 respectively.

• • •

In summary, at present the position of your respective departments is that they are either unable or unwilling to: (1) provide specialists in child psychiatric treatment to

even formulate the treatment plans of the plaintiff class and (2) accept any responsibilities at all for the education of the members of the plaintiff class that are placed outside the State of Idaho (the Department of Education should note that this is a very limited responsibility which will diminish over time as the Stipulation is implemented). These are very fundamental issues going to the very heart of the "right to appropriate treatment and education in the setting least restrictive of personal liberty" which is the subject of this lawsuit. Therefore, the plaintiff class would suggest that if there can be no stipulation on these issues at this time, that these issues be litigated, by summary judgment if possible, after a Stipulation on the remaining issues (paragraph 10 of the Stipulation could be changed to reflect this arrangement).

I personally feel that the enclosed Stipulation reflects a fair accommodation between the parties on current law and should be signed in the best interest of Idaho's youth. It is my sincere hope that your respective departments will agree.

If you have any questions or comments, please call or write.

Sincerely,

/s/ Charles Johnson,
Attorney at Law

June 16, 1981

Mr. Charles Johnson
Idaho Legal Aid Services, Inc.
P.O. Box 1136
Idaho Falls, Idaho 83401

Re: Jeff D. vs. Evans

Dear Charlie:

You have asked for a description of the items which the Department of Health and Welfare wishes to discuss at the meeting of June 23rd.

1. Paragraph 11(b)(i). DH & W is concerned that this provision will encourage local school districts to stop payment of the educational services associated with out-of-state placements.

2. Paragraph 12(a). DH & W is concerned that this paragraph will impede the development of inpatient community psychiatric facilities. Local facilities cannot be expected until they perceive a need for specialized units. The prohibition on admissions might delay the development of this resource.

3. Paragraph 12(b). DH & W has a variety of concerns on the protection issue, not the least of which is that segregation may not be the most efficient way to resolve the case. This provision does not address the situation when the juvenile is the aggressor. Nor does it address any due process interests.

4. Paragraph 12(c)(1). DH & W is unable to warrent the "implementation" of the NICH facility.

5. Paragraph 12(d). It would seem unreasonable to require all facilities to develop hospital treatment plans.

6. Paragraph 12(d)(1). Inclusion of an adolescent specialist in the development of the ITP may not be the most effective means of ensuring availability of specialized services.

7. Paragraph 13(e). Any DH & W settlement is conditioned on non-liability for costs and fees thus far received.

Sincerely,

/s/ James Wickham
Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

STIPULATION AND CONSENT DECREE

COMES NOW the parties to the above-entitled action, by and through their respective counsel, and hereby stipulate as follows:

1. This is a class action for declaratory and injunctive relief on behalf of the named Plaintiffs and the class they represent consisting of all Idaho children under the age of twenty-one (21) who now or will in the future, suffer from emotional or mental handicaps and who are, or will in the future, be institutionalized or otherwise placed in residential programs of Defendants. Plaintiffs and the class they represent seek relief from the Defendants' alleged failure to provide adequate or appropriate treatment and educational programs in the least restrictive setting in violation of Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution;

Article I, Section One, Thirteen and Eighteen, and Article X, Section One of the Constitution of the State of Idaho; the Community Mental Health Centers Act (42 U.S.C.A. 2661); the Rehabilitation Act of 1973 (29 U.S.C.A. 794); the Education for all Handicapped Children Act (20 U.S.C.A. 1401); the Developmental Disability Assistance and Bill of Rights Act (42 U.S.C.A. 6000); the Idaho State Education of the Handicapped and Others Unable to Attend School Statutes (Idaho Code Section 33-2001); and the Idaho Youth Rehabilitation Act (Idaho Code Section 16-1800).

The named plaintiffs and the class they represent have property and liberty interests, secured under these federal and state laws, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these plaintiffs with the opportunity to develop their full potential.

• • •

13. General Provisions:

a. Placements of plaintiffs and the class they represent shall be in their respective family homes. All other placements shall be in the available setting least restrictive of individual liberty consistent with the clinical or educational needs of such plaintiff. Notwithstanding, the defendants shall act in concert, in all cases and whenever necessary, to help ensure the delivery of appropriate mental health and educational services to members of the plaintiff class in an individually appropriate setting that is least restrictive of personal liberty within the State of Idaho.

b. The Defendants shall, on September 1, 1982, and every year thereafter for five years or until the court otherwise so orders (see below), file a report with the above-entitled court, with a copy to plaintiff's counsel of record; such report shall detail the extent of Defendant's compliance with this Consent Decree, and the future plans for compliance with this Consent Decree.

c. The parties will attempt to reconcile any difficulties with the implementation of this Consent Decree. The plaintiff class or their representatives (next friend or Idaho Legal Aid) shall have the power to submit any dispute under this Consent Decree to the above-entitled court for decision by contempt sanction or otherwise, should reconciliation fail.

d. The Court will retain jurisdiction over this action for five (5) years or until the court is satisfied by stipulation or otherwise, that the actions and omissions complained of herein no longer exist and will not reoccur.

e. All parties shall bear their own attorney's fees and costs thus far incurred.

DATED this ——— day of ————————, 1981.

October 13, 1981

James R. Wickham, Esq.
Deputy Attorney General
450 West State Street, 7th Floor
Boise, Idaho 83720

Re: *Jeff D. v. Evans,*
Case No. 80-4091

Dear James:

You will find enclosed copies of two letters. These indicate that I will not Stipulate to an extension of time

in the hearing set in this matter and that I will settle independently with the Department of Education.

My position is that I have been more than reasonable in my settlement offer. Anything less would be a severe disservice to the children and in my opinion a fraud on these children and the court. I think you probably agree. In fact, I thought the matter had been settled.

In any case, the reason I am writing is to purpose [sic] a meeting in Boise on October 16, 1981, between myself and all defendants to try to settle this case once and for all. If this can be arranged, please contact me so we can arrange a time and place.

In the meantime please be advised that I am preparing for a full adversary hearing on October 19, 1981. I intend to do everything in my power to "win" my motions. If I go through with this hearing there will be no Stipulation on the issue of attorney's fees.

If you have any questions or comments, please call or write.

In the best interests of Idaho's emotionally disturbed children,

/s/ CHARLES JOHNSON

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

STIPULATION AND CONSENT DECREE FOR PROVISION OF MENTAL HEALTH SERVICES; AND ORDER

COMES NOW the Plaintiffs in the above-entitled action and Defendants Thomas L. Purce, George Bachik and

Carroll Elmore, by and through their respective counsel, and hereby stipulate as follows:

• • •

10. General provisions:

a. Placement of plaintiffs and the class they represent shall be in their respective family homes. All other placements shall be in the available setting least restrictive of individual liberty consistent with the clinical needs of such plaintiff. Notwithstanding, the defendants shall act in concert, in all cases and whenever necessary, to held, [sic] insure the delivery of appropriate mental health and educational services to members of the plaintiff class in an individually appropriate setting that is least restrictive of personal liberty within the State of Idaho.

b. The Defendants shall, on September 1, 1982, and every year thereafter for five (5) years or until the court so orders (see below), file a report with the above-entitled court, with a copy to plaintiff's counsel of record; such report shall detail the extent of Defendant's compliance with this Consent Decree, and the future plans for compliance with this Consent Decree.

c. The parties will attempt to reconcile any difficulties with the implementation of this Consent Decree. The plaintiff class or their respectives (next friend or Idaho Legal Aid) shall have the power to submit any dispute under this Consent Decree to the above-entitled court for decision by contempt sanction or otherwise, should reconciliation fail.

d. The Court will retain jurisdiction over this action for five (5) years or until the court is satisfied by

stipulation or otherwise that the actions and omissions complained of herein no longer exist and will not recur.

e. All parties shall bear their own attorney's fees and cost thus far incurred.

DATED this —— day of ————, 1981.

IDAHO LEGAL AID SERVICES, INC.
Mental Disability Law Unit
400 N. Eastern Ave. - P.O. Box 1136
Idaho Falls, Idaho 83401
(208) 523-0043

November 30, 1981

Mr. James Wickham
Deputy Attorney General
450 W. State Street - 7th Floor
Boise, Idaho 83720

Re: *Jeff D. v. Evans*

Dear Mr. Wickham:

In accordance with your request, I have again reviewed your draft stipulation which resulted from our September meeting in Boise. I find that we are very close on the vast majority of the covered issues. The following comments are made with a view toward favorably concluding our discussions, and are based on your most recent draft stipulation.

• • •

It is my personal view that the negotiations conducted to date have been productive, fair with respect to our relative interests, and marked by meaningful concessions from

both sides. Above all, I believe we have succeeded in resolving some very difficult points so as to place the minimum possible burden on the Department's limited resources.

Frankly, I think neither of the parties has any bona fide excuse for failing to achieve a final settlement at this point in time. The above points are presented to you as a step toward that goal rather than away from it.

I will be most happy to personally discuss this further with agency officials if need be, and encourage you to give me your earliest, frank assessment of the status of these few remaining questions.

Sincerely,

/s/ Russell E. Webb
Managing Attorney